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No. 74-407

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1974

ERNEST D'FELICE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Petitioner,

vs.

UNITED STATES OF AMERICA,

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Petitioner, Ernest Infelice, prays that rehearing be allowed, and that upon such rehearing, a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit.

This Court's order denying the petition for Writ of Certiorari was entered on January 13, 1975. This Petition for Rehearing is timely filed within 25 days of said date in accordance with Rule 58(2).

Prefatory Statement

As noted by the Court of Appeals, "The Government's case was built upon the testimony of an informer, Robert Burks." (App. A. 3)[1] Petitioner contended on appeal that in view of the evidence presented by way of tape recordings of various conversations which Burks allegedly had with petitioner and with certain co-defendants (not parties to the Petition for Certiorari or to this Petition for Rehearing), which substantially contradicted and impeached Burks' in-court testimony, the evidence was insufficient to sustain petitioner's convictions, and that the trial court's acceptance of Burks' in-court testimony in the face of the impeaching tapes, which the trial court rejected, amounted to application of an improper standard in evaluating the evidence. The Court of Appeals disagreed, concluding that the trial court's reliance on Burks' in-court testimony was justified because of that court's exclusive province in determining both the credibility of the witness and the probative weight to be afforded the tapes. (App. A. 10)

Because of this unusual situation—that is, head-on conflict between the in-court testimony of Burks and that of petitioner, and tapes having been admitted into evidence which impeached Burks' in-court testimony—petitioner further contended that the trial court's denial of his pre- and post-trial motions for polygraph testing constituted an abuse of discretion. The reviewing court deemed denial of the motions to have been appropriate within the trial court's discretion.

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[1] "App. A" refers to Appendix A to the Petition for Certiorari, consisting of the Court of Appeals' Unpublished Order affirming petitioner's conviction.

These issues were among those presented to this Court in the Petition for Certiorari which has been denied.

Since the time of filing of the Petition for Certiorari and the present time, counsel for petitioner has discovered a line of authority supportive of petitioner's arguments noted above. Such authority constitutes "other substantial grounds available to petitioner although not previously presented" within the meaning of Rule 58(2).

Argument

Giving substantial additional support to petitioner's arguments (1) that the trial court's refusal to consider the impeachment value of the tapes constitutes reversible error, and (2) that the trial court abused its discretion under the circumstances by denying petitioner's motions for polygraph testing, are several cases dealing with the propriety of considering a witness' prior record of convictions for impeachment purposes.[2] While these cases are not directly in point, they contain language expressing a judicial philosophy which, we submit, was violated by the trial court's rulings as noted above.

In approving admission of the criminal records both of the defendant (who had testified in his own behalf) and of the complaining witness, Circuit Judge Warren Burger (now Chief Justice of this Court), speaking for a panel of the Court of Appeals, stated:

> "It [defendant's criminal record] was received because the case had narrowed to the credibility of two persons—the accused and his accuser—and in those circumstances there was greater, not less, compelling reason for exploring all avenues which would shed light on which of the two witnesses was to be believed." *Gordon* v. *United States,* 383 F.2d 936, 941 (D.C. Cir. 1967).

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[2] The authorities relied upon herein, while substantially supportive of petitioner's arguments concerning the trial court's erroneous failure to consider the impeachment value of the tapes and that court's abuse of discretion in denying his motions for polygraph testing, arose in a different though related area of criminal law, thus explaining counsel's failure to include such authorities in the Petition for Certiorari. Counsel states that he discovered these authorities on January 27, 1975, while researching the law in an unrelated case and immediately perceived their value as supportive of petitioner's arguments.

This language from *Gordon* has been cited with approval by another Court of Appeals in an opinion similarly holding such evidence properly admissible, as follows:

> "[I]n the *Gordon* case it was observed that where a verdict depended primarily on the jury's assessment of the credibility of the accused and of his accuser, 'there was greater, not less, compelling reason for exploring all avenues which would shed light on which of the two witnesses was to be believed.' 383 F.2d at 941." *United States* v. *DiVarco*, 484 F.2d 670, 677 (7 Cir. 1973).

One can scarcely imagine a clearer case than petitioner's wherein it may be said that the verdict depended primarily upon the court's "assessment of the credibility of the accused and of his accuser". Hence, in accordance with the judicial philosophy expressed in the aforecited cases, the court had "compelling reason for exploring all avenues which would shed light on which of the two witnesses was to be believed."

Yet, by disregarding the impeachment value of the government tapes and by denying petitioner's motions for polygraph testing of himself and his accuser, the trial court violated this enlightened precept. Rather than "exploring all avenues which would shed light" on the credibility question, the trial court closed the blinds.

In effect, petitioner's guilt was determined by a fact-finder who precluded himself from consideration of relevant material directly useful in making difficult credibility determinations.

Moreover, even if it may be said *arguendo*, that the trial court did consider the tapes and was within proper bounds of discretion in choosing nonetheless to believe Burks, under the peculiar factual circumstances of this case, judicial discretion clearly was abused by denial of petitioner's motions for polygraph testing.

Convictions wholly based upon the in-court testimony of an unsavory undercover informer[3] whose testimony was substantially impeached by tapes should not be permitted to stand in the face of petitioner's plea that the trial court permit him to take a lie detector test from a licensed examiner, under conditions to be specified by the court, to support his position that he, not the informer, was telling the truth on the witness stand.

Conclusion

Petitioner prays that rehearing be allowed, and that upon rehearing, this Court issue a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

JULIUS LUCIUS ECHELES
Attorney for Petitioner

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[3] Remember, Burks had an extensive criminal record; he was paid a total of $17,000 by the government for his "cooperation"—more money than he had ever legitimately earned in his life,—and he was assisted by federal agents in connection with a State pimping criminal charge while petitioner's case was pending. See Pet. pp. 13-14.

CERTIFICATE OF COUNSEL

Undersigned, counsel for petitioner hereby certifies that the petition for rehearing is presented in good faith and not merely for the purpose of delay and is limited to the grounds specified in Supreme Court Rule 58(2). As is set out in the Petition, other substantial grounds are raised which are available to the petitioner, although not previously presented.

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